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Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of

Hyperion Telecommunications, Inc.

Petition Requesting Forbearance

Time Warner Communications

Petition for Forbearance

Complete Detariffing for

Competitive Access Providers and

Competitive Local Exchange Carriers)

OFFICE OF THE SECRETARY

CCB/CPD No. 96-3

CCB/CPD No. 96-7

CC Docket No. 97-146

AT&T Reply

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AT&T Corp. ("AT&T") hereby replies to the comments of other parties on the Commission's proposal to completely detariff exchange access services provided by competitive local exchange carriers ("CLECs").

In its comments, AT&T opposed the Commission's proposal to completely detariff CLECs' provision of interstate exchange access services, on the grounds that Section 10 does not grant the Commission authority to require carriers to withdraw tariffs and that mandatory (i.e., complete) detariffing is not in the public interest. With only one exception, all of the commenters oppose complete detariffing and support permissive detariffing for the services that are the subject of the notice, and no party provides any basis to support the Commission's

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proposal to detariff CLECs' provision of <u>switched</u> exchange access services.¹ Significantly, the opponents of mandatory detariffing include parties that will operate both as CLECs and as IXCs purchasing access from other CLECs. Thus, even if the Commission had legal authority to impose mandatory detariffing under Section 10 (and AT&T continues to believe that it does not), the comments confirm that mandatory detariffing of CLECs' switched access services is not consistent with the public interest, as Section 10 requires.

I. MANDATORY DETARIFFING WOULD INCREASE CLECS' RISKS AND COSTS AND PLACE THEM AT A SERIOUS COMPETITIVE DISADVANTAGE COMPARED TO ILECS.

Previously, the access services provided by non-dominant carriers consisted almost entirely of dedicated arrangements negotiated directly between the competitive access providers ("CAPs") and their customers. However, the dramatic changes wrought by the 1996 Act and the Commission's local competition and access reform orders have radically changed the profile of the access services that such carriers will be providing in the future. In particular, the Commission's rulings have promoted Congress'

E.g., Hyperion, pp. 5-10; ACSI, pp. 1-2; RCN, p. 6; TRA, pp. 5-9; WinStar, pp. 2-4. Ad Hoc's support for mandatory detariffing was limited to the provision of dedicated access services (i.e., customer-specific service arrangements). Ad Hoc's comments lend no support for the mandatory detariffing of CLECs' switched access services.

intent to open local exchange and exchange access service markets to competition, and created the potential of competition for switched, not merely dedicated, access services. In this environment, multiple CLECs will be providing switched access services, particularly terminating access services, to multiple IXCs.

In its recent order reconsidering in part its decision to require mandatory detariffing of domestic services provided by nondominant IXCs,² the Commission acknowledged the concerns of AT&T and other carriers regarding their ability to form and enforce binding arrangements with customers absent tariffs, and it created exceptions to its detariffing requirements in some circumstances. In particular, the Commission recognized that carriers could not readily establish binding arrangements with customers who use 1+ dial-around services on a casual (i.e., call-by-call) basis, and it permitted carriers to maintain tariffs for such services. It also provided for a transitional tariff period when customers select a new presubscribed IXC through their serving LEC. Similar concerns about the difficulties and expense of

Policies and Rules Concerning the Interstate,
Interexchange Marketplace, CC Docket No. 96-61, Memorandum
Order and Opinion on Reconsideration, FCC 97-293, released
August 20, 1997 ("Detariffing Reconsideration Order").

forming binding arrangements exist for CLECs' switched access services.

Specifically, CLECs do not select their access customers; rather, the access customer (<u>i.e.</u>, the IXC) is typically selected by the party who pays for the call. This raises serious issues and risks for the CLEC with regard to establishing enforceable arrangements with IXCs. In particular, a CLEC confronted by an IXC customer of the CLEC's terminating access service who refuses to pay the CLEC's charges or abide by its other terms of service is placed in an untenable position. The CLEC must choose between expensive and problematic litigation with the IXC to prove that a binding arrangement exists, and to enforce its terms under an implied contract theory (and thus accumulate higher uncollectibles), or attempt to suspend the delivery of interstate, interexchange calls placed by the IXC's end users.

Suspending the delivery of calls (<u>i.e.</u>, blocking) is both technically impractical and socially undesirable. Indeed, a blocking option is not currently possible for terminating access unless the CLEC operates its own switch and does not receive traffic through an ILEC tandem.³

(footnote continued on next page)

When a CLEC provides terminating access through use of an ILEC's tandem switch, CLECs cannot block calls on a carrier-specific basis, because carrier codes are not passed

Moreover, blocking could not be applied for terminating access, and would be extremely cumbersome and expensive for originating access, when the CLEC buys switching from the ILEC, either separately or as part of an unbundled network element platform.4 Even where the CLEC operates its own switch, it would have to incur the costs needed to (a) determine whether that carrier is bound to pay the CLECs' charges for access; and (b) interrupt the call flow to block completion of the call if the IXC has not become bound to the CLECs' terms. In such cases, the CLEC also may consider it necessary, for marketing reasons, to play an announcement explaining why the call is not being completed. CLECs would be much less likely to find it necessary to resort to such measures if they were permitted to continue to file tariffs for their switched access services.

⁽footnote continued from previous page)

beyond the ILEC tandem. Thus, CLECs do not have access to any codes or other signaling information which are necessary to enable them to block calls in real time.

It would be extremely difficult, if not impossible, for ILECs that provide unbundled switching to develop the ability to identify individual calls between specific originating (or terminating) IXCs and specific CLECs who are using the switch and block completion of such calls in real time. Even if such development were possible -- and ILECs were willing to undertake it -- the implementation period for such a capability is unknown, and ILECs' charges for the capability could be significant.

The consumer and market consequences of blocking would also be very significant, because blocking requires consumers to suffer inconvenience due to circumstances outside their control. Blocking means that customers' calls will not go through as intended, interfering with customers' expectations and adversely affecting the CLEC's market reputation.⁵

As Hyperion states (pp. 8-9), by subjecting CLECs to the additional costs and risks of establishing binding arrangements with multiple IXCs purchasing switched access services, mandatory detariffing will place them at a disadvantage relative to incumbent LECs, and is therefore contrary to the public interest. Because ILECs will continue to exercise market power over access services for the foreseeable future, the Commission properly requires them to file tariffs for their access services. However, the existence of such tariffs means that the ILECs need not incur any costs to create switched access arrangements with any IXCs; rather, they can rely on their tariffs to

See ACSI, p. 4. End users originating interexchange calls in the CLEC's area may ultimately be able to complete the call by using an IXC with whom the CLEC has an appropriate access arrangement, but such requirements would impact the CLEC's business reputation with its customers. In contrast, it is problematic that callers trying to terminate calls would understand how to complete calls the CLEC blocks at the terminating end.

establish a clear, binding obligation on IXCs to pay access charges. The disadvantage faced by CLECs who are denied the option of filing tariffs is substantially compounded by the costs of and risks attributable to litigation with recalcitrant access customers concerning their obligation to comply with their access terms. The Commission should be especially reluctant to adopt any proposal that would provide the entrenched incumbents with an additional cost advantage over new entrants.⁶

II. MANDATORY DETARIFFING OF SWITCHED ACCESS SERVICES
CREATES NO COUNTERVAILING PUBLIC BENEFITS, AS CONFIRMED
BY THE UNANIMOUS OPPOSITION OF CLECS AND IXC
ACCESS CUSTOMERS

Because it offers no countervailing public benefits that could not be achieved through permissive detariffing, there is no basis to subject CLECs to the costs and competitive disadvantages associated with mandatory detariffing of access services. Indeed, not only do all CLECs oppose mandatory detariffing, but no IXCs -- who would presumably be the beneficiaries of such a policy -- support it either.

Moreover, because ILECs would <u>never</u> have to block (or threaten to block) calls to assure their <u>legal right</u> to collect access charges, they would have a significant marketing advantage against CLECs. Thus, far from benefiting competition, the Commission's mandatory detariffing proposal would harm CLECs' customers and CLECs' ability to compete.

As AT&T has previously shown, the filed rate doctrine is not a concern, either as a matter of law or of economics. Contrary to the Commission's assumption, the doctrine simply would not apply if a CLEC and its access customer enter into a written contract under a permissive detariffing regime. By its terms, the prohibition in Section 203(c) against charging and collecting any rate other than the tariffed rate does not apply if "otherwise provided by or under authority of this Act." The Commission has already exercised its authority under Section 10 of the Act to relieve non-dominant carriers of the mandatory tariffing requirements of Section 203(c), thereby permitting the use of written contracts for their access services. Accordingly, Section 203(c) will not permit, much less require, carriers to invoke the filed rate doctrine and abrogate the terms of a written contract through a tariff filing.7

Nor is there any other reason to adopt mandatory in lieu of permissive detariffing. There is no evidence of

See Letter, J. Argentieri (AT&T) to W. Caton (FCC) CC Docket 96-61, July 17, 1997; ALTS, p. 1. AT&T respectfully submits that the Commission's conclusion to the contrary in the Detariffing Recon. Order ignores the "otherwise provided" language of section 203(c), and is therefore erroneous. In all events, until the Commission's recent order granting Hyperion's petition, although CAPs were required to file tariffs, they filed contracts instead, and no problems with the filed rate doctrine arose.

price coordination among CLECs. Further, CLECs' and CAPs' minuscule market shares for exchange access services, combined with the fact that ILECs must (for good reason) continue to file access tariffs, are fatal to any claim that mandatory detariffing of CLECs' access services will reduce the theoretical risk of price coordination. Finally, the customers of switched access services -- IXCs -- have substantial experience operating in a tariffed environment, and have both the knowledge and means necessary to protect their interests when operating under either contracts or tariffs in a permissive regime.

See Intermedia, p. 4; GST, p. 3. Administrative expenses incurred by the Commission under a permissive detariffing regime may be offset by charging CLECs reasonable fees for the filing and retention of switched access service tariffs. Further, allowing CLECs to file permissive tariffs gives them greater, rather than less, flexibility to place new services into the market promptly and uniformly (see Frontier, p. 3).

CONCLUSION

There is no legal or policy basis for the Commission to prohibit CLECs from filing tariffs for switched access services. Accordingly, the Commission should allow CLECs to provide such services under a permissive detariffing regime.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 17th day of September, 1997, a copy of the foregoing "AT&T Reply" was served by U. S. first class mail, postage prepaid, to the parties on the attached service list.

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